

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

COURTHOUSE NEWS SERVICE,)

Plaintiff,)

v.)

Civil Action No.: 3:21cv460-HEH

KARL R. HADE, et al.,)

Defendants.)

_____)

JOINT STIPULATIONS OF FACT

Plaintiff Courthouse News Service (“CNS”), Defendant Karl R. Hade, in his official capacity as Executive Secretary of the Office of Executive Secretary of the Supreme Court of Virginia (the “Executive Secretary”), and Defendant Jacqueline C. Smith, in her official capacity as Clerk of the Circuit Court for Prince William County, Virginia (the “Prince William Clerk”) stipulate and agree as follows:

About CNS

1. CNS is a nationwide news service that specializes in reporting on civil litigation, from the initial complaint to subsequent filings, hearings, and rulings, through the appellate level, in state and federal courts across all 50 states, including Virginia.

2. CNS now has more than 2,750 subscribers nationwide, including law firms and libraries, academic institutions, publicly traded companies, government entities, non-profit organizations, news and entertainment media outlets, and watchdog groups.

3. A wide range of news and media outlets rely on CNS to learn about new civil filings, and CNS has been credited as the original source of reporting by newspapers, legal publications, magazines, television, radio, and online media.

4. CNS offers a variety of publications. One category of publications is CNS' New Litigation Reports, which contain original, staff-written summaries of significant and newsworthy new civil complaints. New Litigation Reports focus on general jurisdiction civil complaints against business institutions, public entities, prominent individuals, or other civil actions that might be of interest to CNS' subscribers.

5. CNS publishes two New Litigation Reports in Virginia: the *Virginia Report*, which covers new litigation filed in 31 Virginia circuit courts, including the Circuit Court for Prince William County (the "Prince William Circuit Court"), and the *Southern Virginia State Report*, which covers new litigation filed in 89 Virginia circuit courts. These reports are sent to subscribers via email each weekday evening.

6. Among CNS' other publications are its monthly newsletter, the *Entertainment Digest*, as well as the *Daily Brief*, which covers published, nationwide appellate rulings, including all U.S. Supreme Court and federal circuit decisions, as well as significant rulings from federal district courts, including the district courts in Virginia.

7. CNS also publishes a publicly-available website (www.courthousenews.com) featuring news reports and commentary, which is read by hundreds of thousands of readers each month. The website functions much like a print daily newspaper, featuring staff-written articles about the news of the day from throughout the nation that are posted and rotate on and off the page on a 24-hour news cycle. Many of the stories on the website focus on ongoing court cases and rulings in state and federal courts, including those in Virginia.

8. CNS' publications do not cover criminal, domestic relations, or juvenile matters, nor do they include name changes, probate filings, or most residential foreclosure.

9. To prepare the New Litigation Reports and identify civil filings that may warrant a website article, CNS reporters have traditionally visited their assigned courts on a daily or weekly basis to review complaints and other civil court documents filed that day, or since their last visit, to determine which ones are newsworthy. However, as the vast majority of federal courts and many state courts are putting court records online via court web sites, CNS also covers courts remotely through the Internet, without the need to require reporters to travel to those courts.

10. State courts that provide remote online access to all civil filings and other court records (except for those that are recognized as confidential under any applicable law or sealed pursuant to court order), either on a statewide basis or through individual courts within the state, include California, Louisiana, Massachusetts, Oklahoma, Tennessee, and Washington – in which several of the courts are predominantly paper-filing courts – as well as courts within Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North and South Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.

11. All federal courts in the nation, including the United States district courts in Virginia, give the press and public remote online access to civil court records via PACER.

12. CNS currently employs approximately 240 people, most of them editors and reporters, who review and report on the day's civil filings filed at their assigned courthouse(s).

13. In Virginia, CNS currently employs three reporters who cover the state and federal trial and appellate courts across the state and who are based in the larger metropolitan

areas – Prince William County, Norfolk, and Richmond. Those reporters are supervised by CNS’ Southeast Bureau Chief, Ryan Abbott.

14. Of the 120 Virginia circuit courts, CNS currently sends reporters to five of them on a daily basis, *i.e.*, Prince William, Fairfax, Norfolk, Richmond City, and Virginia Beach.

15. CNS currently covers one circuit court, *i.e.*, Alexandria, remotely on a daily basis by accessing new civil filings through the Internet via the Alexandria Justice Information System (“AJIS”). CNS previously covered the Alexandria Circuit Court by sending a reporter to the court on a weekly basis.

16. Twelve other circuit courts are currently covered by sending one of the three Virginia-based reporters to the court on a less than daily basis, *i.e.*, Arlington, Chesapeake, Chesterfield, Fauquier, Hampton, Hanover, Henrico, Loudoun, Newport News, Portsmouth, Stafford, and Suffolk.

17. CNS covers the remaining 102 Virginia circuit courts only with docket information, *i.e.*, party names, case type, court name, due to their remote locations.

18. The CNS reporter covering the Prince William Court, Joan Hennessey, visits the courthouse in person on a daily basis. She also covers the Fairfax County Circuit Court in person on a daily basis. Upon arrival at the clerk’s office at each courthouse, Ms. Hennessey reviews all newly filed complaints and other civil filings made available since her last visit, and then reports on the newsworthy filings that day. Any cases filed and made available after she leaves the courthouse each day are not covered until the next day.

19. Ms. Hennessey also currently covers the Alexandria Circuit Court remotely via AJIS on a daily basis, while covering the circuit courts in Arlington, Fauquier, and Loudoun in person on a weekly basis.

About the Prince William Clerk and Virginia Circuit Courts

20. The Prince William Clerk, Jacqueline C. Smith, was elected the Clerk of the Circuit Court for Prince William County, Virginia in April 2017.

21. The Prince William Clerk is an independently elected constitutional officer and serves as the custodian of all court records, including books, evidence, records, maps, and papers, deposited in her offices or other locations designated by her, including records stored in electronic format whether in the clerk's office or elsewhere, and the clerk is responsible for making those records available to the public for inspection and examination.

22. The Prince William Clerk is also responsible for developing and implementing the policies and procedures for operating the Prince William Circuit Court Clerk's Office, in conformance with applicable law, including those relating to access to non-confidential civil filings and other court records that are filed in the Prince William Circuit Court.

23. The term "non-confidential civil filings" and "non-confidential civil court records" as used herein shall mean any civil filing or other court record maintained by a clerk of a Virginia circuit court that is not recognized as confidential under any applicable law or sealed pursuant to court order.

24. In all Virginia circuit courts, including the Prince William Circuit Court, upon request, and subject to other demands of their office, clerks provide the public and press with access to non-confidential civil filings and other court records filed in their respective courts at the physical courthouse.

25. The Prince William Clerk provides the public and press, including CNS, with access to non-confidential electronic civil court records, including new filings and court rulings, through its public access terminals located in the Civil Division during normal business hours.

26. The Civil Division of the Prince William Clerk's Office is open to the public Monday through Friday, 8:30 a.m. to 5:00 p.m.

27. Since 2012, the Prince William Clerk has also provided all subscribers, whom the Clerk approves and authorizes, with remote online access to electronic images of all non-confidential civil court records filed in the Prince William Circuit Court, including new filings and court rulings, through an application known as the Officer of the Court Remote Access System ("OCRA"). OCRA is provided by OES to the Prince William Clerk and any other interested circuit court clerks. Currently, in addition to the Prince William Clerk, clerks for 104 other Virginia circuit courts provide subscribers, whom those clerks likewise approve and authorize, with remote online access to electronic images of certain non-confidential civil court records filed in their respective courts through OCRA. Other circuit clerks have acquired similar applications provided by private vendors.

28. The Prince William Clerk does not offer remote online access to civil court records to any members of the press or public unless they are a Virginia-barred attorney or the staff member of a Virginia licensed attorney.

About the Executive Secretary

29. The Executive Secretary serves as the administrator of the Virginia circuit court system, which includes the operation and maintenance of a case management system utilized by many circuit court clerks, including the Prince William Clerk, to conduct the business of the clerk's office.

30. The case management system used by the Prince William Clerk, as well as all but two Virginia circuit court clerks, which helps manage their court records, including new civil filings, is known as the Circuit Court Case Management System ("CCMS"), which was created,

and is now operated and maintained, by the Office of the Executive Secretary of the Supreme Court of Virginia (“OES”).

31. In response to demand from circuit clerks, OES created, and now supports and maintains, a Case Imaging System (“CIS”) that enables participating circuit courts, including the Prince William Circuit Court, to create and store electronic images of case documents that the clerk may, if he or she so chooses, make available for viewing by members of the public and press on public access terminals at the courthouse. The Prince William Clerk makes electronic images of case documents available for viewing by the public and press in this manner. Clerks using CCMS may or may not use CIS.

About the Virginia Information Technologies Agency (VITA)

32. Virginia Information Technologies Agency (“VITA”) is the state agency “responsible for the administration and enforcement of” Chapter 20 of Title 2.2, which is the Chapter of the State Code related to Information Technology. *See* Virginia Code § 2.2-2005 *et. seq.*

33. VITA has developed and promulgated Information Technology Resource Management (ITRM) Standard SEC503-02.2: Security Standard for Restricted Remote Access to Documents on Court-Controlled Websites, available at <https://www.vita.virginia.gov/media/vitavirginiagov/it-governance/psgs/pdf/RemoteAccessDocsCrtContrdSEC503.pdf>.

34. VITA Standard SEC503-02.2 includes a model Application for Internet Access to Records Management System. This Standard also includes a model Subscriber Agreement For Internet Access to Circuit Court Documents.

About OCRA Access

35. OES also created, and now supports and maintains, OCRA, which is an application developed by OES for circuit courts that use CIS. The OCRA application enables circuit clerks to make non-confidential CIS case images available for secure online viewing by their subscribers at <https://cisweb.vacourts.gov/Ocra>. Clerks using CCMS may or may not use OCRA.

36. The records viewable through the OCRA application are stored on local servers controlled by the respective local circuit court clerks.

37. An OCRA subscriber is responsible for paying any subscriber fee charged by the circuit court clerk and for the proper use of the secure remote access system pursuant to the subscriber agreement and applicable Virginia law. OES has no statutory authority to set the subscriber fee and does not receive any part of the fee from individual subscribers.

38. The Executive Secretary provides maintenance and technical support for the OCRA platform for those Virginia circuit courts, such as the Prince William Clerk, that pay for this support and utilize OCRA. The application for government OCRA access is provided to clerks free of charge. There is a sliding scale for annual maintenance charges for clerks who have five (5) or more private (non-governmental) subscribers: the annual maintenance charge is \$500 for clerks with 5-14 private subscribers; \$1,500 for clerks with 15-34 private subscribers; \$3,500 for clerks with 35-54 private subscribers; \$5,500 for clerks with 55-94 private subscribers; and \$9,500 for clerks with 95 – 400 private subscribers.

39. The Prince William Clerk currently has 269 private subscribers to OCRA, and pays OES an annual maintenance charge of \$9,500.

40. To log in to the OCRA System, a subscriber visits a centralized website (<https://cisweb.courts.state.va.us/Ocra/login/577728/a.html>) – which OES provides and maintains for the participating circuit clerks – and enters his/her e-mail address, password, and bar number or assigned authorized subscriber number. The OCRA login page states: “This system is intended solely for the use of authorized Officer of the Court personnel to retrieve and review court documents they are specifically authorized to view. All other use is expressly prohibited.” Each participating clerk ultimately determines who is authorized to access the clerk’s records via OCRA, pursuant to and in compliance with applicable law.

41. For circuit court clerks that use OCRA, the clerk or someone designated by the clerk serves as the court’s OCRA Administrator and this person is responsible for both approving and adding subscribers and for removing them, pursuant to and in compliance with applicable law. The court’s OCRA Administrator is responsible for providing their subscribers with a username and temporary password that allows the subscriber to initially log in, and when the subscriber does log in, he/she will be prompted to change their password after their first log in. If OES receives questions about subscriber access, these are referred to the designated OCRA Administrator in the circuit clerk’s office. If a clerk determines that a subscriber is authorized to have access to OCRA, pursuant to and in compliance with applicable law, then that subscriber will be provided access to OCRA. OES does not in any way evaluate or screen potential subscribers once the clerk determines they are authorized. OES receives the name and email addresses of subscribers but does not receive other information and does not know if a subscriber is a licensed attorney.

42. The OCRA application has been provided to 105 out of 120 Virginia circuit courts, including the Prince William Circuit Court, and these clerks now offer OCRA to their subscribers.

43. According to the Attorney Subscriber Agreement For Remote Access to Prince William County Circuit Court Case Documents (the “Attorney Subscriber Agreement”) “[t]he subscription fee is \$200.00 per year for 1 attorney and 1 employee” and any “additional employee for the attorney is \$75 per individual per year.” CNS is willing to enter into an agreement with each circuit court clerk, including the Prince William Clerk, and to pay a similar subscriber’s fee for OCRA access to the Prince William Circuit Court and other circuit courts throughout Virginia for its non-attorney employees.

44. After paying a subscriber’s fee and registering for OCRA, Virginia attorneys and their staff have the ability to view non-confidential civil filings that each court clerk has made available through OCRA remotely over the Internet – on any day of the week, at any time of day, and from any location in the world. To access the same court records without OCRA or an alternative means of remote access, CNS and other members of the press and public must travel to each individual courthouse that uses OCRA, including the Prince William Circuit Court, during business hours.

45. Subscribers, who are authorized and approved by the circuit court clerk, pursuant to and in compliance with applicable law, and who use OCRA have access to civil filings and records in their own cases, as well as filings and records in other cases in which they are not attorneys of record, parties, or otherwise involved, provided those records are scanned into CIS. Not all historical civil court records in a particular circuit court are viewable on OCRA because

each circuit court that uses OCRA began scanning records into CIS at different times. The Prince William Court began doing so in 2009.

46. A new non-confidential civil filing filed at the Prince William Circuit Court, and other Virginia circuit courts, goes through several stages before it is available for viewing online at either the courthouse via public access terminals or remotely via OCRA: (1) initial intake; (2) data entry into CCMS; and (3) scanning into CIS.

47. Once a new civil filing is scanned into CIS, it can be viewed by the press and public via public access terminals at courthouses that provide public terminals, like the Prince William Circuit Court, almost immediately and on OCRA, by subscribers authorized by the circuit clerk shortly thereafter, usually within five minutes of being scanned into CIS.

48. For courts that provide public access terminals at the courthouse, like the Prince William Circuit Court, every civil court record that is available remotely on OCRA has already been made available to the public and press via public access terminals at the courthouse in which the record was filed.

49. There is no difference in the content of the court records that CNS and other members of the press and public must travel to each individual court to see, and the court records that subscribers authorized by the circuit clerk can see remotely over the Internet via OCRA – they are the same records.

50. CNS and other members of the press and public must pay a per page charge for any paper copies of civil court records that they request at the courthouse. Those with OCRA subscriber access can download, save, and print out civil court records as part of their OCRA subscription fee.

51. Pursuant to Va. Code § 8.01-420.8, effective July 1, 2014, those filing civil court records in Virginia circuit courts, including the Prince William Circuit Court, are required to redact all but the last four digits of social security numbers or other identification numbers appearing on a driver's license, credit card, debit card, bank account, or other billing or payment system. The Prince William Clerk and her staff review new civil filings for any unredacted social security numbers or other identification numbers appearing on a driver's license, credit card, debit card, bank account, or other billing or payment system and, if discovered, redact such information before scanning the filing into CIS.

52. In 2018, the General Assembly passed a budget appropriations bill that required OES to convene a workgroup to evaluate issues related to the potential statewide adoption of electronic filing of civil cases in circuit courts and to evaluate the implementation of a system in which digital images of non-confidential records within civil cases in circuit courts may be viewed by subscribers of that system. The workgroup's findings are available at <https://rga.lis.virginia.gov/Published/2018/RD526/PDF>, and those findings shall be admissible for the purpose of this lawsuit.

CNS' Requests for OCRA Access

53. In 2016, CNS requested OCRA access from 46 Virginia circuit court clerks that utilized OCRA at that time. Many did not respond. Of the Virginia circuit court clerks who did respond, they either denied OCRA subscriber access outright or offered CNS OCRA subscriber access if the CNS subscriber was a Virginia-barred attorney.

54. In May 2021, CNS, through its Southeast Bureau Chief, Ryan Abbott, wrote to the Prince William Clerk to request OCRA access. In response, the Prince William Clerk sent a

letter to Mr. Abbott, dated May 13, 2021, denying CNS access to OCRA because Mr. Abbott did not include a Virginia bar license number and a copy of a Virginia bar card with his application.

55. Neither Mr. Abbott nor any of CNS' reporters covering Virginia are attorneys or licensed to practice law in Virginia.

56. In or around January 2019, the Prince William Clerk requested an Opinion from the Attorney General regarding "whether a circuit court clerk may provide members of the press with secure remote access to nonconfidential court records" under Va. Code § 17.1-293. In response to that inquiry, on June 25, 2021, the Prince William Clerk received an informal opinion and advice from Robert B. McEntee, an Assistant Attorney General for the Commonwealth of Virginia and the Executive Secretary's counsel in this case, representing only his "individual view." Mr. McEntee's individual view is that "the Code of Virginia grants circuit court clerks the ability to provide secure remote access to nonconfidential court records to members of the general public under § 17.1-225" but that "[b]ecause systems like OCRA ... exist in part to facilitate access by officers of the court to protected private information pursuant to § 17.1-293(E)(7), circuit court clerks cannot grant the general public remote access to nonconfidential documents through OCRA."

57. The Prince William Clerk denies that she has now, or had at any time, discretion to provide CNS access to OCRA.

58. On March 31, 2021, CNS, through its counsel, wrote to the Executive Secretary and also OES' Director of Judicial Information Technology, Michael J. Riggs, Sr., requesting that CNS be permitted remote online access to OCRA.

59. On April 22, 2021, the Executive Secretary, through OES' Assistant Executive Secretary and Counsel, Edward M. Macon, responded by stating, in part, "The circuit court

clerks are the legal custodians of all circuit court records.” After citing Va. Code § 17.1-293 and stating that OCRA access is limited to “members in good standing with the Virginia State Bar and their authorized agents,” Mr. Macon also stated that “the contents and records that are viewable [on OCRA] are under the custody and control of the circuit court clerks.” Mr. Macon then concluded, “For the foregoing reasons, [the Executive Secretary is] not in a position to provide you with the access you request.”

Dated: May 4, 2022

Dabney Carr /s/

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